86-705

No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT M.T. WILSON,
Petitioner,

v.

THOMAS TURNAGE, Director
Selective Service System,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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October 30, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

65 pp

QUESTION PRESENTED

Where a federal employee was placed on indefinite leave pending psychiatric examination in 1978 for writing a letter to President Carter, and in a final adjudication in 1979 the Merit Systems Protection Board dismissed his appeal as not within its purview, do fundamental principles of res judicata and collateral estoppel bar the Federal Circuit from disregarding the Board's decision and declaring the employee's leave appealable based solely on a *post hac* application of its 1985 decision in an unrelated case, thereby denying his 1981 request for collateral relief?

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Petitioner, Robert M.T. Wilson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on May 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 791 F.2d 151 (Fed. Cir. 1986) (*"Wilson II"*), and appears in the Appendix at 1a-11a. The decision of the United States District Court for the District of Columbia denying attorney fees to Petitioner is not reported and appears in the Appendix at 29a-38a. An opinion of the District of Columbia Circuit reversing

the District Court and granting attorney fees to Petitioner in this case, is reported at 750 F.2d 1086 (D.C. Cir. 1984) (*"Wilson I"*) ; App. at 13a-24a. The District of Columbia Circuit's memorandum and order vacating *Wilson I* and transferring the case to the Federal Circuit are reported at 755 F.2d 967 (D.C. Cir. 1985).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Federal Circuit was entered on May 20, 1986, and Petitioner's request for rehearing *en banc* was denied on June 17, 1986. This Court having extended by 45 days the date in which this Petition may be filed, jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the Savings Clause of the Civil Service Reform Act of 1978, Pub.L. No. 95-454, § 902 (b), 92 Stat. 1224 (codified at 5 U.S.C. § 1101 note), and regulations applying the Clause to matters pending before the Merit Systems Protection Board, 5 C.F.R. § 1201.191(b).

STATEMENT OF THE CASE

Petitioner, who was placed on leave and told to take a psychiatric examination by the Selective Service because he wrote a letter to President Carter, is seeking review of the decision below denying him the attorney fees he expended in gaining his reinstatement. The Court of Appeals' decision, which is predicated on a finding that Petitioner's leave was appealable administratively, totally ignores the final and binding judgment to the contrary by the appropriate administrative agency and therefore is fundamentally at odds with well-established principles of res judicata and collateral estoppel.

Petitioner is a federal civilian employee of the Selective Service System. In 1977 and 1978, while Petitioner

was responsible for analyzing the Selective Service's ability to mobilize in the event of a national emergency, he became increasingly concerned that the Selective Service was not complying with the statutory preparedness requirements prescribed by Section 10(h) of the Military Selective Service Act, 50 U.S.C.App. § 460(h). After his superiors ignored his efforts to bring this problem to their attention, Petitioner in November 1978 delivered to the White House Secret Service detail a letter and supporting material criticizing Respondent's lack of military preparedness and asked that the package be given to President Carter. The Secret Service did not deliver the materials to President Carter; rather, it returned the entire package to Respondent. *See generally*, App. at 1a-2a.

On November 28, 1978, after it received Petitioner's package from the Secret Service, Respondent gave Petitioner a letter directing him to submit to a psychiatric fitness-for-duty examination and placing him on indefinite sick leave status pending receipt of the psychiatric report. The letter expressly stated that Respondent was taking this action "based upon a study of [Petitioner's] recent communications addressed to the President". App. at 39a.

Petitioner refused to take the examination. Consequently, Respondent applied to the Office of Personnel Management ("OPM") for Petitioner's forced retirement on the grounds of an alleged psychiatric disability. OPM denied the application, citing Respondent's failure to comply with the appropriate procedures and an absence of evidence of deficiencies in performance, attendance, or behavior,[1] and expressly noting that Petitioner's letters to President Carter were not evidence of deficient

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[1] In September 1978, shortly before ordering Petitioner to take a psychiatric examination, Respondent evaluated his performance as "outstanding".

performance or behavior. In August 1979, OPM suggested to Respondent that Petitioner be restored to duty in light of the amount of time he had been on leave. Respondent ignored the request. App. at 2a-3a.

Petitioner attempted various means to obtain relief from his placement on enforced leave. Of particular significance to this case, in February 1979 Petitioner filed an appeal with the Merit Systems Protection Board ("the Board" or "MSPB"), alleging that his placement on indefinite leave constituted a suspension in violation of his procedural and substantive rights. The Board, however, held that Petitioner's leave was not a suspension imposed for disciplinary reasons and thus was not an appealable matter within the Board's jurisdiction. App. at 25a.[2] The Board's decision stated that it was "final with no further right of appeal". *Id.*[3]

On April 4, 1979, Petitioner initiated this action, alleging that his placement on leave and the psychiatric examination requirement were violations of his First Amendment rights; he sought in his suit a temporary restraining order, injunctive relief, and retroactive restoration of his position with full benefits. The district court initially granted the injunction, but then vacated it. When Petitioner appealed, the District of Columbia Circuit granted his motion for an injunction to preserve the status quo, but later vacated that order.

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[2] On May 31, 1979, Petitioner's leave was exhausted, and he was placed on leave without pay until his reinstatement was negotiated by the parties on December 10, 1979.

[3] Also in February 1979, Petitioner filed a complaint with the Special Counsel, whose office was created by Congress in the Civil Service Reform Act to investigate prohibited personnel practices. 5 U.S.C. § 1206. The Special Counsel issued a report in October 1979 "concluding that [Respondent] had violated applicable law and regulations by the personnel actions taken against" Respondent. *Wilson I*, 750 F.2d at 1088 n.3; App. at 15a-16a. *See also Wilson II* 791 F.2d at 155 n.1; App. at 6a-7a.

In December 1979, the parties settled their differences. The settlement reinstated Petitioner with back pay and full benefits but reserved for further discussion and possible resolution by the court the issue of his entitlement to attorney fees. Further discussions were fruitless.

The Proceedings Below

On June 23, 1981, Petitioner filed a motion with the district court for an award of attorney fees under the Back Pay Act, 5 U.S.C. § 5596, which authorizes reimbursing employees who have been deprived of pay or benefits. As part of the omnibus Civil Service Reform Act ("CSRA") of 1978, Congress amended the Back Pay Act to include an award of attorney fees to a federal employee whose pay or benefits are restored.[4]

The CSRA also includes a Savings Clause which provides that

> No provision of this Act . . . shall affect any administrative proceedings pending at the time such provision takes effect [January 11, 1979]. Orders shall

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[4] As it now reads, the Back Pay Act provides, in pertinent part, that

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
>
> * * *
>
> (ii) reasonable attorney fees related to the personnel action . . . .

5 U.S.C. § 5596(b)(1)(A)(ii) (1982).

> be taken therefrom as if this Act had not been enacted.

Pub.L. No. 95-454, § 902(b), 92 Stat. 1224 (codified at 5 U.S.C. § 1101 note (1982)). Petitioner's entitlement to attorney fees in light of the Savings Clause depends on whether he was involved in "any administrative proceedings" on January 11, 1979. Clearly, if the November 1978 letter was not a pending administrative proceeding, the Clause does not bar application of the attorney fee amendments to the Back Pay Act.

Following a report and recommendation by a magistrate, the district court denied Petitioner's application for fees. According to the district court, because the actions directed against Petitioner in Respondent's November 28, 1978 letter were an "administrative proceeding", an award of fees under the Back Pay Act was prohibited by the Savings Clause. App. at 36a-37a. The district court based this holding on regulations promulgated by the Board for use in the adjudication of its appeals. That regulation provides as follows:

> No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

5 C.F.R. § 1201.191(b) (1984).

Petitioner appealed the district court's decision to the Court of Appeals for the District of Columbia Circuit, which held that the Savings Clause did not prohibit reliance upon the amended Back Pay Act for an award of fees. *Wilson I*, 750 F.2d 1086 (D.C. Cir. 1984). Subse-

quently, however, the court vacated its decision and transferred the case to the Federal Circuit. *Wilson v. Turnage*, 755 F.2d 967 (D.C. Cir. 1985).[5]

The Federal Circuit's Decision

The Federal Circuit declined to adopt the District of Columbia Circuit's decision and affirmed the district court's denial of fees, holding that the Savings Clause was triggered by the November 28, 1978 letter placing Petitioner on leave. The court arrived at that holding by applying the Board's regulation interpreting the Savings Clause.[6] That regulation, quoted at p. 6 above, defines a "pending proceeding" to encompass existing agency proceedings and appeals "that were subject to judicial review" on January 11, 1979. Because the Board itself had held that Respondent's November 28, 1978 letter to Petitioner placing him on indefinite leave was not subject to appeal, it was unclear how the Clause could bar Petitioner's fee award even in light of the Board's regulation.

The Federal Circuit held that the Savings Clause applied to Petitioner because Respondent's action was, in fact, "appealable to the MSPB, despite its decision to the contrary". App. at 9a. The court based this holding

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[5] In the Federal Courts Improvement Act, Pub. L. 97-164, Title I, § 127(a), 96 Stat. 37, codified at 28 U.S.C. § 1295(a)(2), all appeals of district court decisions in cases asserting jurisdiction under 28 U.S.C. § 1346(a) were directed to the Court of Appeals for the Federal Circuit. The District of Columbia Circuit transferred the case *sua sponte* when it discovered that Petitioner's claim was based in part on § 1346.

[6] By applying the Board's regulation to Petitioner's case, the Federal Circuit implicitly rejected the District of Columbia's holdings that those regulations apply only in the context of the Board's proceedings. *Crowley v. Shultz*, 704 F.2d 1269, 1275 (D.C. Cir. 1983). *Accord, Wilson I*, 750 F.2d at 1089-90, *vac. on other grounds*, 755 F.2d 967 (D.C. Cir. 1985). In Petitioner's case, of course, the Board held that the November 1978 letter was not appealable, and the applicability of its regulations is suspect.

on its *1985* decision in *Thomas v. GSA*, 756 F.2d 86 (Fed. Cir. 1985), in which it concluded that the placement of an employee on involuntary sick leave, albeit for non-disciplinary reasons, was an action appealable to the MSPB. Based upon its *subsequent* decision in *another* case, therefore, the Court of Appeals thus *post hac* declared Petitioner's leave appealable, despite a final administrative decision that his leave *was not* appealable.[7]

Petitioner had argued in his Briefs that fundamental considerations of res judicata and collateral estoppel bound the parties to the Board's decision in *his* case. The court rejected those arguments. App. at 9a. Res judicata was inapplicable, the court declared, because the "application for attorney fees is a cause of action entirely different from [Petitioner's] appeal to the MSPB, which was based upon an alleged illegal suspension". 791 F.2d at 157; App. at 10a.

Nor did the court find that the Board's decision rejecting Petitioner's appeal was binding on the parties through application of collateral estoppel. While acknowledging that prior decisions could act as collateral estoppel for matters actually litigated, the court noted that "a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." 791 F.2d at 157, quoting *Commissioner v. Sunnen*, 333 U.S. 591, 600 (1948); App. at 10a. The court held that its 1985 decision in *Thomas* justified its refusal to apply collateral estoppel to the Board's 1979 decision in Petitioner's case. *Id.*

Petitioner timely suggested that the court rehear its decision *en banc*; however, the court denied the suggestion on June 17, 1986. App. at 12a.

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[7] The Board's 1979 decision rejecting Petitioner's appeal is long since final and not capable of reopening by either party.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Decision is Inconsistent with Traditional Preclusion Principles and Needlessly Raises Doubts About the Binding Effect of the Board's Adjudications

A. Under the Doctrines of Res Judicata, Collateral Estoppel, and Issue Preclusion, the Board's Decision Holding Petitioner's Leave Status Non-Appealable is Binding on the Parties and the Court of Appeals

In holding that the Savings Clause of the CSRA applies to Petitioner, because Respondent's November 28, 1978 letter was appealable to the Board, the Federal Circuit disregarded the final decision of the Board itself which dismissed Petitioner's appeal of the letter on jurisdictional grounds. The decision of the court below, consequently, is fundamentally at odds with this Court's adherence to traditional preclusion principles and has permitted Respondent to avoid the binding effect of a decision to which it was a party.

"Federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). As the Court has described the traditional doctrines,

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell v. County of Sac*, 94 U.S. 351, 352. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153.

Id.

More recently, the Court has appeared to accept the modern reformulation of the doctrines into the concept

of "issue preclusion". *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 79 (1984). Whether discussed in terms of res judicata, collateral estopped, or issue preclusion, there is no question but that principles of finality and repose "foreclose relitigation of a matter that has been litigated and decided". *Marrese v. American Academy of Orthopaedic Surgeons*, 105 S.Ct. 1327, 1329 n.1 (1985).

The policies underlying the doctrines are clear and have been often repeated by the Court:

> res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, *and, by preventing inconsistent decisions, encourage reliance on adjudication.*

Allen v. McCurry, supra, 449 U.S. at 94 (emphasis added). *See also Kremer v. Chemical Const. Co.*, 456 U.S. 461, 466 n.6 (1982); *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Courts simply are not permitted to relitigate matters that have already been adjudicated to a final decision, for such readjudication "would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981), quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932).

Administrative decisions issued by agencies acting in their judicial capacity are entitled to the same preclusive effect as if they had been issued by a court. *See Kremer v. Chemical Const. Co., supra*, 456 U.S. at 484 n.26 (1982); *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966). That principle of administrative res judicata applies fully to decisions of the Merit Systems Protection Board. *Long v. Department of the Air Force*, 751 F.2d 339, 343 (10th Cir. 1984).

Fundamental to the principle of issue preclusion is the binding effect in a collateral proceeding of a finding regarding jurisdiction. A body with adjudicatory power "has the authority to pass upon its own jurisdiction and its decree [regarding] jurisdiction, while open to direct review, is res judicata in a collateral action". *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 377 (1940). *See also* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3536 at 537 (1984 ed.) (a decision regarding subject matter jurisdiction "is res judicata of the issue, if the jurisdictional question was actually litigated and expressly decided").

In 1979, the Board held that Respondent's placement of Petitioner on indefinite leave pending a psychiatric examination did not state an appealable claim and it dismissed his appeal. That judgment is final by its own terms, App. at 27a, and has never been reversed. It is inconceivable that the Board's decision does not foreclose the Court of Appeals from concluding differently.

The Court of Appeals was not permitted to readjudicate the Board's 1979 decision that it lacked jurisdiction over Petitioner's suspension. Since the Board found that Petitioner could not appeal because he had not been disciplined, its decision was a judgment on the appealability of his leave. The Board's decision was binding on the parties even after the Court of Appeals issued its decision in *Thomas*, for the preclusive effect in collateral proceedings of an unappealed judgment is not altered "by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case". *Federated Dep't Stores, Inc. v. Moitie*, *supra*, 452 U.S. at 398, citing *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887).[8]

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[8] The Court of Appeals stated that preclusion principles do not apply "where the situation is vitally altered between the time of

B. By Denying Preclusive Effect to a Final Decision of the Board, the Court of Appeals has Needlessly Cast Doubt on the Finality of the Board's Adjudications

Prior to the Court of Appeals' decision in this case, there was no question that the resolution of disputed factual issues by administrative agencies acting in their adjudicatory capacities was entitled to the same preclusive effect as judgments of a court. *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (if "parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose"); 4 K. Davis, *Administrative Law Treatise* § 21:2, at 49 (2d ed. 1983); Restatement (Second) of Judgments § 83(1) (final administrative adjudication has same effect under res judicata as judgment of a court). The United States Court of Appeals for the Tenth Circuit has concluded that a final decision of the Board meets "the requirements from *Utah Construction* so that courts should give it the same res judicata effect to which it would be entitled if a court had rendered that judgment". *Long v. Department of the Air Force*, 751 F.2d 339, 343 (10th Cir. 1984).

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the first judgment and the second . . . [and] a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable". 791 F.2d at 157, quoting *Commissioner v. Sunnen*, 333 U.S. 591, 600 (1948); App. at 10a. That qualification does not apply, however, to issues, such as the appealability of Petitioner's leave, that have been "actually litigated", for as the Court went on to state in *Sunnen*:

> Of course, where a question of fact essential to the judgment is actually litigated and determined in the first . . . proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different.

Id. at 601. *See also Federated Dep't Stores, Inc. v. Moitie, supra*, 452 U.S. at 398 ("A judgment merely voidable because of an erroneous view of the law is not open to collateral attack, but can be corrected *only by a direct review*"), quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) (emphasis added).

The acceptance of the finality of Board decisions by employees and agencies has had a salutary effect on litigation and resources. All litigants know that decisions of the Board are binding on the parties unless reversed on direct appeal, and a change in the law announced by the Board or the Court of Appeals for the Federal Circuit does not result in a rush to the courthouse by disgruntled employees seeking to reopen their decisions in light of new legal principles.

That reliance upon finality and repose have been disrupted by the Court of Appeals' decision below, for it is no longer clear whether a final decision of the Board will actually be binding upon the parties or the Federal Circuit in collateral proceedings. Rather, unsuccessful litigants are encouraged by the Court of Appeals to try and reopen the Board's decisions in their cases, hopeful that the court's recently adopted policy of denying preclusive effect to decisions that have been altered by "a judicial declaration intervening between the two proceedings", 791 F.2d at 157; App. at 10a, will insulate them from a res judicata defense.[9]

Moreover, the Court of Appeals has selected a particularly inappropriate case in which to announce a policy of denying preclusive effect to decisions of the Board. The purpose of the preclusion principles relied upon by

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[9] The Court of Appeals' reliance upon a decision by its predecessor, *Texaco, Inc. v. United States*, 579 F.2d 614 (Ct.Cl. 1978), is misplaced. *Texaco*, in which the court refused to give preclusive effect to a prior decision regarding taxable basis because of an intervening decision by this Court, was based upon a statute, 26 U.S.C. § 1016(a)(2), that expressly permits readjustment of basis where there has been an erroneous deduction. The Court of Claims recognized that, rather than codifying accepted preclusion principles, the statute was intended to "*overrule* the judicially imposed principles of collateral estoppel and res judicata" that would otherwise apply. 579 F.2d at 616 (emphasis added). Absent a similar statute in this case, and there is none, the Court of Appeals' decision is nothing less than a breach of these principles.

Petitioner were intended to prevent "injustice" [10] and the "inequitable administration of the laws".[11] Unfortunately, as the Court of Appeals recognized, App. at 10a, injustice and inequity are precisely the results in this case, for it has turned Petitioner into a double loser: not only did the Board's decision deprive him of a speedy end to his suspension, the Court of Appeals' revision of that decision has deprived him of the fees that flow directly from the Board's decision.

The Court has not tolerated the failure by lower courts to bind parties to prior adjudications in collateral proceedings. "There is simply 'no principle of law or equity' ", the Court has stated, " 'which sanctions the rejection by a federal court of the salutary principles of res judicata.' " *Federated Dep't Stores, Inc. v. Moitie, supra*, 452 U.S. at 401, quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). The doctrines are "not a mere practice or procedure inherited from a more technical time than ours. [They comprise] a rule of fundamental and substantial justice, 'of public policy and of private peace', which should be cordially regarded and enforced by the courts . . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

By revising in a collateral proceeding a final decision by the Board binding upon Petitioner, the Court of Appeals has circumvented principles of finality and preclusion that have stood for a century. The resulting decision is unfair, inconsistent with the overwhelming weight of authority, and opens the door to endless litigation.

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[10] Restatement of Judgments § 70.

[11] Restatement (Second) of Judgments § 28.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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October 30, 1986

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 85-2270

ROBERT M. T. WILSON,
Appellant,

v.

THOMAS TURNAGE, DIRECTOR,
SELECTIVE SERVICE SYSTEM,
Appellee.

DECIDED: May 20, 1986

Before BALDWIN, *Circuit Judge,* COWEN, *Senior Circuit Judge,* and SMITH, *Circuit Judge.*

COWEN, *Senior Circuit Judge.*

Appellant, Robert M. T. Wilson, appeals from a decision of the United States District Court for the District of Columbia, which denied his application for attorney fees under the Back Pay Act, 5 U.S.C. § 5596 (1982). For the reasons to be set forth, we affirm.

BACKGROUND

A. *The Agency's Actions*

In 1978, the appellant, Wilson, worked as an Operations Evaluation Specialist, GS-13, with the Selective Service System (Selective Service or agency). He was respon-

sible for analyzing and evaluating the agency's ability to mobilize forces in the event of a national emergency. As a result of this work, he became concerned that the agency was unable to meet the statutory preparedness requirements established in section 10(h) of the Military Selective Service Act, 50 U.S.C. app. § 460(h).

Between November 6 and November 25, 1978, after his superiors had apparently ignored his efforts to address the problem, Wilson delivered material outlining his concern over military preparedness to the Secret Service detail at the White House for transmittal to President Carter. The Secret Service informed the agency of Wilson's correspondence with the President, and provided the agency with copies of the material Wilson had delivered.

Shortly thereafter, Wilson's supervisor reviewed some of the correspondence with the Chief of Mental Health Services at Malcolm Grow Air Force Center, who advised that Wilson's mental health should be further evaluated. To that end, by letter of November 28, 1978, the Administrative and Logistics Manager of the Selective Service directed Wilson to undergo a psychiatric fitness-for-duty examination, and placed him on enforced sick leave status effective immediately, pending receipt of the evaluation report.

Wilson refused to submit to an examination, and on April 25, 1979, the agency applied to the Office of Personnel Management (OPM) for an agency-filed disability retirement for Wilson. However, the OPM remanded the application to the agency, because it had failed to comply with the conditions for filing such an application. Specifically, the OPM found that the agency failed to make a preliminary determination that Wilson's performance, attendance, or behavior were below an acceptable level. Furthermore, the OPM found that the agency had not made a *prima facie* case that his service was not useful or efficient. The OPM decision stated that the letters Wilson had written to the President were not the type

of behavior which related directly to his performance or constituted a basis for separation.

After the agency resubmitted the application for disability retirement on August 23, 1979, the OPM again remanded it to the agency, stating that the agency still had not complied with the requisite procedures for retiring Wilson. Again, the OPM stated that the evidence submitted by the agency was not substantive evidence which clearly and convincingly showed Wilson's inefficiency. The OPM suggested that because of the lapse of time, the agency should consider terminating the application and, at the very least, restore Wilson to active duty status while proceeding with the application. The agency did neither.

B. *Wilson's Attempts to Obtain Relief*

While the agency was pursuing the application for disability retirement, Wilson sought several avenues of relief. First, on February 27, 1979, he filed an administrative appeal with the Merit Systems Protection Board (MSPB or Board). The MSPB, however, dismissed the appeal, stating that the enforced sick leave imposed was not used in a personal, disciplinary-type situation, and thus, was not a suspension appealable to the MSPB under the civil service laws. Subsequently, Wilson appealed the MSPB's decision to the United States Court of Claims, but, as hereinafter noted, that appeal was eventually withdrawn, pursuant to a settlement agreement between Wilson and the Selective Service.

Second, also on February 27, 1979, Wilson filed a complaint with the Office of the Special Counsel to the MSPB, alleging harassment and retaliation. On October 23, 1979, the Office of Special Counsel released the report of its investigation in which it found that Selective Service had violated several laws and regulations in the actions taken against Wilson. The Special Counsel specifically noted that the agency was remiss in its "capricious attitude

toward Mr. Wilson and in its failure to consider his due process rights * * *." The Special Counsel found, however, that the evidence did not reveal that the agency's actions were the result of reprisals against Wilson for his disclosure of information relating to the Selective Service.

Third, on April 4, 1979, Wilson filed a complaint in the United States District Court for the District of Columbia, seeking injunctive relief against the agency and requesting restoration to his former position. Although the district court had originally granted Wilson's request for a temporary restraining order on April 5, 1979, it vacated that order on April 11, 1979. After the district court denied Wilson's reapplication for a temporary restraining order, Wilson appealed. On April 25, 1979, a panel of the United States Court of Appeals for the District of Columbia Circuit granted Wilson's request for an injunction to maintain the status quo, but later the court lifted that order. The appeal remained pending until it was withdrawn as part of the settlement agreement.

C. *The Settlement*

On December 7, 1979, the agency and Wilson reached a settlement agreement. Although not admitting a violation of any law, the agency nevertheless reinstated Wilson to active duty status as Writer/Editor, GS-13, effective December 10, 1979, and retroactive to November 28, 1978. The agency also agreed to restore all of his annual and sick leave used during the enforced leave period, to pay all back pay for the period of leave, to reimburse him for benefits he would have earned retroactive to November 28, 1978, and to expunge from his records any reference to the directive that he undergo a psychiatric fitness-for-duty examination. For his part, Wilson agreed to dismiss his appeal in the District of Columbia Circuit, his action in the district court, and his suit in the Court of Claims. Under the settlement agreement, the parties left

for further negotiations, and if necessary, for decision by an appropriate court, Wilson's request for attorney fees and costs.

D. *The Decisions of the District Court and the District of Columbia Circuit On the Attorney Fees Issue*

On June 23, 1981, Wilson filed a motion with the district court for an award of attorney fees under the Back Pay Act, 5 U.S.C. § 5596. Following a report and recommendation by a magistrate, the district court denied the request and held that since an administrative proceeding was pending as of November 28, 1978, an award of attorney fees was barred by the "Savings Provision" of the Back Pay Act. As part of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, § 702, 92 Stat. 1111, 1216, Congress had amended the Back Pay Act to authorize the award of reasonable attorney fees related to a personnel action. 5 U.S.C. § 5596(b)(1)(A)(ii) (1982). The CSRA became effective on January 11, 1979, but included the following Savings Provision:

> No provision of this Act * * * shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

Pub. L. No. 95-454, § 902(b), 92 Stat. 1224 (codified at 5 U.S.C. § 1101 note (1982)).

Wilson appealed the district court's decision to the District of Columbia Circuit, which initially held that the Savings Provision did not bar an award of attorney fees to him. *Wilson* v. *Turnage*, 750 F.2d 1086 (D.C. Cir. 1984). The case was remanded to the district court for a determination of an appropriate amount, but before the district court acted on the remand, the District of Columbia Circuit, *sua sponte*, vacated its decision and trans-

ferred the case to this court. *Wilson* v. *Turnage*, 755 F.2d 967 (D.C. Cir. 1985).

DISCUSSION

A.

The Back Pay Act, as amended by the CSRA, provides in pertinent part:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
>
> * * * *
>
> (ii) reasonable attorney fees related to the personnel action * * *.

5 U.S.C. § 5596(b)(1)(A)(ii) (1982).

The primary issue to be decided in this appeal is whether the letter of November 28, 1978, which directed the appellant to undergo a psychiatric evaluation and placed him on leave, was an "administrative proceeding pending" within the meaning of the Savings Provision of the CSRA.[1] The term "administrative proceeding" is not

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[1] Although the Government initially argued in its brief that appellant's right to recover attorney fees is barred because there had been no finding by an "appropriate authority" that he was

defined in the CSRA, and its legislative history is of little help in interpreting the Savings Provision. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 115-16 (1978); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 88 (1978).

Appellant argues that the agency's notice of November 28, 1978, was merely a personnel action and not an administrative proceeding, and that the Savings Provision does not bar an award of attorney fees. He points to 5 U.S.C. § 2302(a)(2)(A) (1982), which defines personnel actions to include a disciplinary or corrective action. After carefully considering appellant's argument and the authorities he cites, we find that his analysis of the statute does not resolve the issue confronting us. The distinction appellant draws between the term "personnel action" and the term "administrative proceeding" does not establish when an administrative proceeding is pending for purposes of the Savings Provision.

Because the language of the statute does not show Congress' intent, we agree with the district court that we should be guided by the regulation promulgated by the MSPB, which implemented and construed the Savings Provision. The regulation provides in pertinent part:

> (b) *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act

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affected by an unjustified or unwarranted personnel action, the Government withdrew this contention on March 3, 1986.

The magistrate's report to the district court concluded that the relief obtained by appellant under the settlement agreement was sufficient to establish that he was a "prevailing party." He also concluded that there was no necessity for a formal finding by a court or administrative authority of an unjustified or unwarranted personnel action, because the settlement agreement provided relief predicated on the principle that the personnel action was unjustified and unwarranted. We agree with these conclusions, particularly in view of the rulings of the OPM on the agency's application for Wilson's disability retirement and the findings of the Office of Special Counsel of the MSPB. *See also Hoska* v. *United States Department of the Army*, 694 F.2d 270, 273-74 (D.C. Cir. 1982).

> shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

5 C.F.R. § 1201.191(b) (1985).

The courts accord great deference to interpretations of a statute by an agency which is charged with its administration. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). We may not reject the agency's interpretation unless there are compelling reasons why we should not follow it. *Aero Mayflower Transit Co., Inc.* v. *ICC*, 711 F.2d 224, 228 (D.C. Cir. 1983). We cannot say that MSPB's interpretation of the Savings Provision in the quoted regulation is inconsistent with the language of the statute, its legislative history, or the purposes of the CSRA. Moreover, several counts have upheld the MSPB's interpretation of the Savings Provision in cases involving other adverse actions against employees. *See Glenn* v. *MSPB*, 616 F.2d 270, 271 (6th Cir. 1980) (per curiam); *Ellis* v. *MSPB*, 613 F.2d 49, 51 (3d Cir. 1980) (per curiam); *Kyle* v. ICC, 609 F.2d 540, 542-43 (D.C. Cir. 1980) (per curiam); *Motley* v. *Secretary of the Army*, 608 F.2d 122, 123 (5th Cir. 1979) (per curiam); *Gaskins* v. *United States*, 221 Ct. Cl. 918, 919-20 (1979). The District of Columbia Circuit in *Kyle* expressly held that the MSPB properly construed the Savings Provision as meaning that administrative proceedings existed in all cases where employees received notice of proposed personnel actions before, but who had their cases decided by the MSPB after, the effective date of the CSRA.

When the quoted regulation is applied to the facts in this case, it is clear that this court's recent decision in

Thomas v. *GSA*, 756 F.2d 86 (Fed. Cir. 1985), compels a conclusion that the notice of personnel action was an "administrative proceeding pending" on the effective date of the CSRA within the meaning of the Savings Provision. In *Thomas*, the GSA had placed its employee on involuntary sick leave pending a decision on a disability retirement application filed by the agency pursuant to 5 C.F.R. § 831.1206. Thomas appealed to the MSPB, which held that it had no jurisdiction to hear the appeal, because, in addition to other requirements, the suspension of Thomas did not stem from a disciplinary-type situation. In reversing the decision of the MSPB, this court held that Congress intended to define "suspension" in accordance with the definition of that term which had been adopted by the Civil Service Commission in its policy issuances. Since the policy issuances of the Civil Service Commission defined "suspension" as "an action placing an employee in a temporary non-duty and non-pay status for disciplinary reasons, or for other reasons pending inquiry," the court held that the placement of Thomas on involuntary sick leave and his non-disciplinary suspension was an action which was appealable to the MSPB.

Although there are insignificant factual differences between the *Thomas* case and this case, we hold that *Thomas* is controlling. Since the 1978 action of the Selective Service in *Wilson* was appealable to the MSPB, despite its decision to the contrary, the agency action was an "administrative proceeding pending" at the time the CSRA became effective. Accordingly, we conclude that the Savings Provision of the CSRA precludes appellant's right to recover attorney fees under the provisions of the Back Pay Act, as amended.

There remains for consideration, appellant's argument that the Government is barred from relying on the decision in *Thomas* by the doctrines of *res judicata* and collateral estoppel. Appellant argues that the MSPB decision of June 15, 1979, which held it had no jurisdiction

over his appeal from the order placing him on enforced sick leave, is a final and binding decision which may not be relitigated. The doctrine of *res judicata* applies to prevent repetitious litigation on the same cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 586, 597 (1948). But, where a second suit is brought upon a different cause of action, *res judicata* has no force or effect. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1948); *Creek Nation* v. *United States*, 168 Ct. Cl. 483, 488 (1964). Even if we assume arguendo that the MSPB decision which dismissed Wilson's appeal for lack of jurisdiction was a final decision, the conclusion is inescapable that his application for attorney fees is a cause of action entirely different from his appeal to the MSPB, which was based upon an alleged illegal suspension.

If we proceed on the same assumption, it is equally clear that collateral estoppel, or issue preclusion, does not apply in this case. Prior decisions act as collateral estoppel for subsequent actions as to those matters actually presented and determined in the first suit. However, "where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive * * * [and] a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." *Commissioner* v. *Sunnen*, 333 U.S. at 600. There is no doubt that the decision of this court in *Thomas* was such an intervening change in the legal atmosphere that it renders the bar of collateral estoppel inapplicable in this case. *Texaco, Inc.* v. *United States*, 579 F.2d 614 (Ct. Cl. 1978).

CONCLUSION

This is a case in which appellant's persistent efforts to vindicate his rights have been hampered by the law's delay. The delay is indeed regrettable, and we can under-

stand appellant's frustration at the turn of events in this litigation. However, we are bound by the doctrine of *stare decisis* and are not empowered to grant the extra-legal relief which would be entailed in holding that appellant is entitled to recover attorney fees in this case. Accordingly, we conclude that the decision of the district court must be sustained.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2270

ROBERT M. T. WILSON,
Appellant,

v.

THOMAS TURNAGE, DIRECTOR,
SELECTIVE SERVICE SYSTEM,
Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

6/17/86
Date

cc.: Mr. George M. Chuzi
Mr. Robert A. Reutershan, DOJ

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 83-2323

ROBERT M. T. WILSON,
Appellant,

v.

THOMAS TURNAGE, ACTING DIRECTOR,
SELECTIVE SERVICE SYSTEM

Argued Oct. 12, 1984

Decided Dec. 28, 1984

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 79-0971)

George M. Chuzi, Washington, D.C., with whom June D.W. Kalijarvi, Washington, D.C., was on the brief, for appellant.

Judith Bartnoff, Asst. U.S. Atty., Washington, D.C., with whom Joseph E. diGenova, U.S. Atty., and Royce C. Lamberth and R. Craig Lawrance, Asst. U.S. Attys., Washington, D.C., were on the brief, for appellee.

Before TAMM and EDWARDS, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the court filed by Circuit Judge TAMM.

TAMM, Circuit Judge:

Appellant Robert M.T. Wilson challenges the district court's denial of attorney's fees under the Back Pay Act, 5 U.S.C. § 5596 (1982). In a memorandum opinion and order issued October 26, 1983, the district court held that the Savings Clause of the Civil Service Reform Act of 1978 (Reform Act) precluded an award of fees. Although the Reform Act amended the Back Pay Act to provide for awards of attorney's fees in cases of unjustified personnel actions taken against federal employees, the Savings Clause makes the new law inapplicable to "administrative proceedings" pending as of January 11, 1979. Wilson contends that the district court erred in its finding that a November 28, 1978 letter from appellee Selective Service System directing him to undergo a psychiatric examination and placing him on sick leave status pending the results constituted an "administrative proceeding for purposes of the Savings Clause. Because we find that the November 28 directive constituted a "personnel action" and not an "administrative proceeding," we reverse the decision of the district court and remand for a determination of the amount of attorney's fees owed appellant pursuant to 5 U.S.C. § 5596(b)(1)(A)(ii).

I. Background

Appellant Robert M.T. Wilson worked for the Selective Service System as an Operations Evaluation Specialist responsible for analyzing the agency's ability to mobilize in the event of a national emergency. In the course of his work, Wilson became concerned that his agency was unable to meet the statutory preparedness requirements prescribed by section 10(h) of the Military Selective Service Act, 50 U.S.C. App. § 460(h) (1982). After his superiors ignored his attempts to bring this problem to their attention, Wilson in November 1978 delivered to the White House Secret Service detail a letter and supporting docu-

ments criticizing the agency's lack of military preparedness. Wilson requested that the materials be given to President Carter, but the Secret Service instead returned the letter and documents to the Selective Service.

On November 28, 1978, the Selective Service sent Wilson a letter directing him to submit to a psychiatric fitness-for-duty examination and placing him on sick leave status pending receipt of the psychiatric report.[1] The letter stated that the agency was requiring the examination "based upon a study of your recent communication addressed to the President." Joint Appendix (J.A.) at 32.

In February 1979, Wilson filed an administrative appeal with the Merit Systems Protection Board (the Board or MSPB). The Board, however, held that it had no jurisdiction to hear the appeal because Wilson's leave was not a suspension or action imposed for disciplinary reasons.

On April 4, 1979, Wilson sued the Selective Service in the district court alleging a violation of his First Amendment rights and seeking a temporary restraining order, injunctive relief, and restoration to his former position with full benefits. Following a series of actions in both the district court and this court,[2] as well as an investigation by the Office of Special Counsel,[3] the parties settled

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[1] Wilson's leave was exhausted on May 31, 1979, at which time the agency placed him on leave without pay. He was restored to duty on December 10, 1979.

[2] The district court granted the temporary restraining order on April 5 and vacated it on April 11, 1979. Wilson reapplied on April 19, but the district court denied the application and Wilson appealed. A panel of this court granted a temporary order restraining the agency from disturbing the status quo on April 25, 1979. That order was listed on May 25, 1979, and the appeal remained pending until it was withdrawn as part of the December 1979 settlement agreement. Brief for Appellant at 8.

[3] On February 27, 1979, Wilson filed a complaint with the Office of Special Counsel of the Merit Systems Protection Board. The

the dispute in December 1979. The settlement reinstated Wilson with back pay and full benefits but reserved the issue of his entitlement to attorney's fees.

On June 23, 1981, Wilson filed a motion with the district court for attorney's fees and costs under the Back Pay Act. Following a report and recommendation by a magistrate, the district court denied Wilson's request and held that, because an administrative proceeding was pending as of the November 28, 1978 letter, an award of attorney's fees under the Back Pay Act was barred by application of the Savings Clause. J.A. at 6. Wilson appeals, arguing that "administrative proceeding' must be distinguished from "personnel action" at those terms are used in the Reform Act. Wilson contends that because the November 28 letter constituted a personnel action and no judicial or administrative actions were instituted prior to January 11, 1979 the Savings Clause does not apply to bar an award of fees.

II. Discussion

The primary issue in this appeal is whether the November 1978 letter from the Selective Service System directing Wilson to undergo psychiatric evaluation and placing him on leave was an "administrative proceeding" for purposes of the Savings Clause of the Civil Service Reform Act of 1978.

The Back Pay Act, 5 U.S.C. § 5596, is a waiver of the government's sovereign immunity for relief in cases of improper personnel actions taken against federal employees.[4] In 1978, as part of the Civil Service Reform

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Office of Special Counsel was created by the Civil Service Reform Act in 1978 to investigate prohibited personnel practices. The Special Counsel issued a report on October 23, 1979 concluding that Selective Service had violated applicable law and regulations by the personnel actions taken against Wilson. Joint Appendix (J.A.) at 62, 66, 68.

[4] 5 U.S.C. § 5596(b)(1) provides specified relief to "[a]n employee of an agency who, on the basis of a timely appeal or an ad-

Act, Congress amended the Back Pay to include awards of "reasonable attorney fees related to the personnel action." 5 U.S.C. § 5596(b)(1)(A)(ii) (1982).

The Reform Act became effective on January 11, 1979, but it included a Savings Clause which provides that

> No Provision of this Act . . . shall affect any administrative proceedings pending at the time such provision takes effect. Order shall be issued in such proceedings and appeals shall be taken therefrom as if this Act has not been enacted.

5 U.S.C. § 1101 note, 902(b) (1982). Thus, if "administrative proceedings" were pending in this case on or before January 11, 1979, the Savings Clause would bar an award of attorney's fees under the Back Pay Act even if Wilson were otherwise entitled to such an award.

Selective Service argues that an administrative proceeding existed in this case as of November 28, 1978—the date on which Wilson received notice that he was being placed on sick leave and required to take a psychiatric examination. The Service bases this argument on a regulation promulgated by the MSPB that interprets the Savings Clause. That regulation provides as follows:

> No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

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ministrative determination . . . is found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action."

5 C.F.R. § 1201.191(b) (1984). Selective Service argues that the MSPB regulation should govern the resolution of this case, observing that section 1201.191(B) "was specifically noted with approval" by this court in *Kyle v. ICC*, 609 F.2d 540, 542 (D.C.Cir.1980). The Service further asserts that the interpretation of the Savings Clause by the MSPB is entitled to deference because of the Board's special role in federal personnel administration. Brief for Appellee at 7.

Although the Board's interpretation of the Savings Clause "should be respected, in accordance with the judicial deference usually accorded to the interpretation made by the agency charged with a statute's administration," *Kyle*, 609 F.2d at 542, it cannot control a dispute that, unlike *Kyle*, is not on appeal from an administrative proceeding of the Board and which, by the Board's own determination, falls outside its jurisdiction. Selective Service cannot argue that a regulation adopted by an administrative body to govern its own proceedings should apply in matters that the body itself determines are not within its jurisdiction. The regulation itself is directed by its own terms exclusively to the Board, stating that no provision of the Reform Act "shall be applied *by the Board* in such a way as to affect any administrative proceeding." 5 C.F.R. § 1201.191(b) (1984) (emphasis added).

Moreover, this court on another occasion has stated expressly that *Kyle's* relevance to cases, like this one, that arise under the Back Pay Act is extremely limited. In *Crowley v. Shultz*, 704 F.2d 1269 (D.C.Cir. 1983), three State Department employees challenged that department's "overcomplement policy" [5] in a suit filed prior to the Re-

[5] "Under the overcomplement system, certain employees, while not terminated, were placed in what the appellees described . . . as 'limbs'; their positions were abolished and they were not selected for promotions or other forms of advancement. . . . No notice was given to employees placed in overcomplement status, nor were they afforded any opportunity to challenge their disfavored status." 704 F.2d at 1271.

form Act's effective date. Following resolution of the merits of their claims, the district court awarded the employees attorney's fees under the amended Back Pay Act. The State Department appealed the award, arguing that the Savings Clause should have been interpreted to block any fee award. The question presented was whether the district court suit constituted an " 'administrative proceeding' or an appeal therefrom" such that the Savings Clause would apply to judicial proceedings brought pursuant to the Back Pay Act. *Id.* at 1272.

In its analysis, the court noted that the legislative history of the Reform Act treated together the Act's two attorney's fees provisions: 5 U.S.C. § 7701(g), which relates only to MSPB proceedings, and 5 U.S.C. § 5596(b)(1)(A)(ii), which permits awards of attorney's fees by courts and administrative agencies under the Back Pay Act. The court reasoned that "three classes of decisionmakers . . . may be called upon to award attorneys' fees under the Reform Act fee provisions: (1) the MSPB, . . . (2) other agency adjudicators providing relief pursuant to the Back Pay Act, and . . . (3) courts acting under the Back Pay Act." 704 F.2d at 1273. Because the Savings Clause clearly applied to the first two situations, the court saw no reason to treat the third any differently and held that the clause did apply to judicial proceedings brought pursuant to the Back Pay Act. Because the *Crowley* plaintiff filed suit before the Reform Act's effective date, application of the Savings Clause precluded an award of fees. In so holding, however, the court expressly found *Kyle* inapplicable to its resolution of the issues under the Back Pay Act.

> *Kyle* . . . interpreted the Savings Clause, but did so in the context of normal appellate review of a Merit Systems Protection Board decision. *Kyle* did not involve the remedial authority of a district court under the Back Pay Act and is not suggestive where the puzzle is the application of the Reform Act's Savings

> Clause to that part of the Reform Act that amends the Back Pay Act.

Id. at 1275.

That the Savings Clause applies to requests for fees under both section 7701(g) and section 5596(b)(1)(A)(ii), as *Crowley* held, does not mean that the Board's *regulations* must apply uniformly as well. Indeed, *Crowley* made clear that section 1201.191(b) did *not* apply to situations outside the Board's own proceedings. In rejecting the appellants' argument that this same regulation was "instructive" in the proper interpretation of the Savings Clause, this court in *Crowley* stated unequivocally that "this provision [§ 1201.191(b)], by its terms, applies to administrative proceedings. Its reference to the Board and to notice strongly suggests that the regulation is not at all addressed to district court suits to which the Back Pay Act applies." 704 F.2d at 1275.

Because we find the Board regulation inapplicable, our interpretation of the term "administrative proceedings" as used in the Savings Clause must be guided by the plain language of the statute. As the United States Supreme Court has frequently stated, the court's "starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979). The legislative purpose " 'is expressed by the ordinary meaning of the words used.' Thus, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982) (citations omitted).

The district court held that the Savings Clause was triggered by the November 28 letter because that letter was a "personnel action" initiated prior to January 11, 1979. J.A. at 17. We believe the district court correctly labeled the letter but failed to distinguish between the

terms "administrative proceedings" and "personnel action" as they are used in the Reform Act. Where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings. *See National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C.Cir.1982) ("the use of different terminology within a statute indicates that Congress intended to establish a different meaning"). *See also National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C.Cir.1982) ("use of two different terms is presumed to be intentional").

Congress expressly defined the term "personnel action" in the Reform Act as

> (i) an appointment; (ii) a promotion; (iii) . . . disciplinary or corrective action (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation . . .; (ix) a decision concerning pay, benefits or awards . . .; (x) any other significant change in duties or responsibilities.

5 U.S.C. § 2302(a)(2). In addition, Congress used the term throughout the Reform Act in a manner which demonstrates that, had Congress intended the Savings Clause to apply to all *personnel actions* initiated prior to January 11, 1979, it would have used that term rather than the term "administrative proceedings." The Back Pay Act, for example, provides remedies for "unjustified personnel actions," 5 U.S.C. § 5596(b)(1). The section governing the powers of the MSPB and the Office of Special Counsel provides that the Board in reviewing specified rules and regulations may declare any provisions thereof "invalidly implemented by any agency, if the Board determines that such provision, as . . . implemented by the agency through any personnel action . . . has required any employee to violate section 2302(b) of this title." 5 U.S.C. § 1205(e)(2)(B). In aodition,

5 U.S.C. § 1208 empowers the Special Counsel to request a stay of any personnel action if the Special Counsel reasonably believes that the personnel action was or will be taken as a result of a prohibited personnel practice.

The manner in which the term is used thus suggests that Congress viewed personnel actions as events that may be the *subject* of an administrative proceeding, and the basis for a remedy obtained *through* such a proceeding, but not the equivalent. Moreover, 5 U.S.C. § 7701 (a), governing appellate procedures of the MSPB, provides that "[a]n employee . . . many submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation." That provision demonstrates that a personnel action by itself will not automatically trigger administrative machinery in motion. It merely provides a basis for an appeal at the discretion of the employee. If no challenge is mounted, then the entire matter is ended. No proceedings are "pending," nor do they even exist, because no further action would be necessary to provide a final resolution of the issue.

To allow a unilateral personnel action without more to trigger the Savings Clause would be to treat the clause as a statute of limitations, cutting off all claims arising from wrongful actions undertaken prior to the enactment of the Reform Act. The purpose of a Savings Clause, unlike a statute of limitations, however, is not to cut off stale claims. Rather, the Savings Clause is designed to avoid the disruption of ongoing deliberations that would be caused by a change in the applicable law. Wilson had filed no complaints with any administrative or judicial bodies, nor had he otherwise engaged any administrative machinery that would in any way be disrupted by the changes in the law caused by the January 11, 1979 effective date of the Reform Act. To construe the term "administrative proceedings" so broadly as to encompass the Selective Service's letter to Wilson would serve

no policy advanced by the Savings Clause and would significantly thwart the clear congressional intent to award attorney's fees to those who have been wronged by unwarranted personnel actions. Although we do not purport to define here the meaning of the term "administrative proceedings" for purposes of the Savings Clause in all cases and circumstances, we do find that in cases arising under the Back Pay Act and not appealable to the MSPB, something more is required than mere notice of a proposed personnel action.

Because we have concluded that the Savings Clause will not bar an award of fees to Wilson, we turn now to the question of his entitlement to them. The Service contends that Wilson is not entitled to fees even absent the Savings Clause because there was no finding in this case by an "appropriate authority" that Wilson had been the victim of an "unjustified or unwarranted personnel action" as required by the Back Pay Act. Brief for Appellee at 12.

We disagree. An employee who is the prevailing party may be awarded reasonable attorney's fees under the Back Pay Act if such an award is "warranted in the interest of justice." *Hoska v. United States Department of the Army*, 694 F.2d 270, 274 (D.C.Cir.1982). That standard was satisfied in *Hoska* where the Army's actions were "wholly unfounded and petitioner was substantially innocent of the accusations made against him." *Id.*

The magistrate's report and recommendation to the district court concluded that the relief obtained by Wilson pursuant to the settlement agreement established him as a "prevailing party." J.A. at 22 n. 3. In addition, the Office of Special Counsel found substantial violations of regulations and laws by Selective Service, J.A. at 60-68, and the Office of Personnel Management found substantive and procedural deficiencies in the agency's actions taken against Wilson. J.A. at 57-59.

Under the circumstances, we do not believe that any further proceedings are necessary on the issue of Wilson's entitlement to attorney's fees. We agree with the magistrate's conclusion that there is no need for a formal hearing on the issue

> . . . where the agency, by virtue of the settlement, has granted relief, which of necessity is predicated upon the principle that the personnel action at issue was unjustified and unwarranted. To require formal findings would discourage settlements by plaintiffs and lead to adjudications which would be an unwarranted imposition upon judicial and administrative adjudicatory resources.

J.A. at 22 n. 3. We therefore conclude that appellant has been the victim of an unfair and unjustified personnel action and that an award of fees is warranted in the interests of justice.

Because we find that no administrative proceedings were pending as of January 11, 1979 and that appellant is entitled to an award of attorney's fees, we reverse the district court's decision and remand for a determination of the appropriate amount.

So ordered.

MERIT
SYSTEMS
PROTECTION
BOARD

Washington, D.C. Region
Washington, D.C. 20419

APPEAL OF ROBERT M. T. WILSON
UNDER PART 752, SUBPART B, OF THE
CIVIL SERVICE REGULATIONS

DECIDED ON JUN. 15, 1979

DECISION # DC752B90257

INTRODUCTION

By letter dated February 27, 1979, appellant appealed to this office from an action taken by his agency of placing him in an enforced leave status from the position of Operations-Evaluation Specialist, GS-301-13, Selective Service Systems, Washington, D.C. effective November 28, 1978.

JURISDICTION

The record reflects that the agency by letter dated November 20, 1978, advised appellant that because of his recent communications to the President, it had decided that appellant had to undergo a fitness-for-duty examination and that he would be placed on sick leave pending the receipt of the report of the examination. The letter also advised that an appointment had been scheduled for December 6, 1978, with a doctor and that he could select another doctor if he objected to the one selected by the agency. Attempts to obtain such an examination were unsuccessful and appellant was retained in the sick leave status.

The Civil Service Commission, now the Office of Personnel Management has approved the policy that placing an

employee on leave without his consent in a personal, disciplinary-type situation when he is ready, willing, and able to work constitutes a suspension. Since the period of enforced leave in this case is greater than thirty days, a determination that the action taken by the agency in this case was a suspension would make the action appealable to the MSPB under Part 752, Subpart B, of the Civil Service regulations.

In order for a period of enforced leave to constitute a suspension under this policy, all the following elements must be present:

1. The employee must have been placed on leave without his consent. This means that the employee neither requested nor consented to the leave status.
2. The employee must have been ready, willing, and able to work during all, or a part of, the period of enforced leave. This means not only that the employee was willing and available to perform his assigned duties but also his conduct or his physical or mental condition did not create a situation in which his presence at the place of employment constituted an immediate threat to government property or to the well-being of the employee himself, his fellow workers, or the general public.
3. The enforced leave must have been used in a personal, disciplinary-type situation. This means that the employee must have been placed on a forced leave as a disciplinary action, as a part of a disciplinary action, or as a prelude to a possible disciplinary action (such as pending investigation or inquiry).

Based on our review of the entire record, we find that the enforced leave imposed in this case was not used in a personal, disciplinary-type situation. In the instant case, appellant was placed in an enforced leave status

pending the results of the fitness-for-duty examination which was scheduled for December 6, 1978, and, thereafter, when he refused to undergo a fitness-for-duty examination that had been requested by the agency. After several unsuccessful attempts to obtain a fitness-for-duty examination, the agency filed a disability retirement application for the appellant. The record reflects that appellant remained in a leave status pending the Office of Personnel Management's determination on the agency-filed application for appellant's involuntary disability retirement. Accordingly, the agency action in placing the appellant in leave status without his consent is not considered as being taken in connection with a disciplinary action since the disability retirement action is not a personal disciplinary-type action.

In view of the foregoing and based upon the entire record, we find that the placement of the appellant on leave without his consent in the instant case was not a personal, disciplinary-type situation and therefore, not a suspension appealable to the MSPB under Part 752, Subpart B, of the Civil Service regulations. Accordingly, the agency action in placing the appellant in an enforced leave status effective November 28, 1978, is not within the purview of the MSPB's appellate jurisdiction.

In view of the above we do not find it necessary to make a finding on the timeliness of the appeal.

DECISION

For the reasons stated above, we decline to accept the appeal for adjudication.

The decision of the appeals officer is final and there is no further right of appeal. This means that the decision of the appeals officer marks the exhaustion of those administrative remedies which must precede resort to the courts. However, sections 772.310 and 772.312 of Title 5, Code of Federal Regulations, permits the Board, in its

discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider any previous decision of an appeals officer when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued;

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand; or

(4) The decision of the appeals officer involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Board members.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit that information and where appropriate, evidence of temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If the appellant has evidence or argument which he believes meets one or more of these criteria, he must submit that information within a reasonable time after receipt of this decision.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0971

ROBERT M. T. WILSON,
Plaintiff

v.

THOMAS TURNAGE, DIRECTOR
SELECTIVE SERVICE SYSTEM,
Defendant

[Filed Oct. 26, 1983]

MEMORANDUM OPINION

This action is before the Court to consider the report and recommendation of Magistrate Burnett ("Magistrate's Report and Recommendation") on the issue of plaintiff's entitlement to an award of attorneys' fees, plaintiff's objections to the Magistrate's recommendation against an award of attorneys' fees and memorandum of points and authorities in support thereof, defendant's response thereto, and the entire record herein. For the reasons stated below, the Court agrees with the Magistrate's recommendation and finds that plaintiff is not entitled to an award of attorneys' fees under the Back Pay Act, as amended, 5 U.S.C. § 5596(b) or under 5 U.S.C. § 7701(g). Therefore, the Court must deny plaintiff's motion for attorneys' fees.

On May 26, 1983, Magistrate Burnett filed a Report and Recommendation in which he determined, *inter alia*,

that plaintiff is not entitled to an award of attorneys' fees under the Back Pay Act, as amended, 5 U.S.C. § 5596(b)(1)(A)(ii), by reason of the Savings Clause of the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 note (Supp. V 1981). Plaintiff objects to this determination [1] and contends that the Magistrate based his report on an erroneous interpretation of *Crowley v. Schultz*, 704 F.2d 1269 (D.C. Cir. 1983).

I.

The pertinent history of this case is as follows: [2]

In November 1978, plaintiff Robert M. T. Wilson, an employee of the Selective Service System ("Selective Service"), wrote a number of letters to the President of the United States critical of the Selective Service System's ability to mobilize in the event of a military emergency. Between November 6 and 21, 1978, plaintiff delivered materials to the White House Secret Service detail, for transmittal to President Carter. Rather than delivering these materials to the President, the U.S. Secret Service advised the Selective Service of the situation. A meeting was held with Mr. Wilson on November 28, 1978, at which time the Selective Service directed him to take a psychiatric fitness-for-duty examination. The details of this meeting also were recorded in a letter dated November 28, 1978, which was given to Mr. Wilson. The letter stated that the necessity for this examination was "based upon a study of your recent communications addressed to the President." Plaintiff was put on sick leave status pending the agency's receipt of the report of the psychiatric examination.

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[1] Because plaintiff did not object to the Magistrate's determination that 5 U.S.C. § 7701(g) is inapplicable in this case, the Court incorporates by reference this portion of the Magistrate's Report and Recommendation. *See* Magistrate's Report and Recommendation at 6 n.4 (filed May 26, 1983).

[2] For a more detailed discussion of the factual background of this case, *see* Magistrate's Report and Recommendation at 4-7.

On February 27, 1979, plaintiff appealed his enforced sick leave status to the Merit Systems Protection Board ("MSPB" or "Board"), on the ground that he had been constructively suspended in violation of the regulations. In a decision dated June 15, 1979, the Board held that plaintiff's enforced leave status had not been imposed for disciplinary reasons and therefore was not a suspension within its jurisdiction. Plaintiff appealed this ruling to the United States Court of Claims.

Plaintiff filed this suit on April 4, 1979, alleging a violation of his first amendment right to write to the President. In the complaint, plaintiff indicated that he had appealed to the agency, to the Office of the Special Counsel, and to the MSPB but that these appeals proved futile. Complaint at ¶ 10.

In December 1979, the parties settled the case and the Selective Service agreed to reinstate plaintiff with full retroactive pay and benefits, in accordance with the provisions of the Back Pay Act, 5 U.S.C. § 5596. As part of the settlement agreement, plaintiff withdrew his appeal to the United States Court of Claims.

Paragraph 8 of the settlement agreement provided that:

> The parties agree to reserve for further negotiation and if necessary for decision by an appropriate court, without waiver of any rights by either party, Mr. Wilson's alleged right to attorney fees and costs.

The parties were unable to resolve the matter of attorneys' fees and plaintiff filed a motion for attorneys' fees and costs. The Government responded with a motion to dismiss. The Court denied defendant's motion to dismiss and referred the matter of attorneys' fees to Magistrate Burnett.

II.

The Civil Service Reform Act of 1978 ("Reform Act" or "Act"), which became effective January 11, 1979,

amended the Back Pay Act to provide for an award of attorneys' fees to federal employees under certain circumstances. Section 5596 of the Back Pay Act states in pertinent part:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
>
> * * * *
>
> (ii) reasonable attorney fees related to the personnel action. . . .

5 U.S.C. § 5596(b)(1)(A)(ii).

The Reform Act also contains a Savings Clause, Pub. L. 95-454, § 902 (codified at 5 U.S.C. § 1101 note). Section 902 states in pertinent part:

> (b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

Pub. L. No. 95-454, § 902(b) (codified at 5 U.S.C. § 1101 note).

The Magistrate found that the Savings Clause barred an award of attorneys' fees to plaintiff because the administrative proceeding involving plaintiff was pending as

of November 28, 1978, prior to the effective date of the Reform Act. Magistrate's Report and Recommendation (filed May 26, 1983). In so ruling, the Magistrate found the decision in *Crowley v. Schultz, supra*, to be dispositive. Magistrate's Report and Recommendation at 9. Plaintiff contends, however, that no "action" was pending in this case prior to January 11, 1979, the effective date of the Reform Act, because plaintiff filed this suit on April 4, 1979. Therefore, plaintiff argues that the Savings Clause does not apply and that the Magistrate's interpretation of *Crowley* is erroneous.

The decision in *Crowley v. Schultz*, relating to availability of attorneys' fees under the Back Pay Act, grew out of a suit filed in March 1974 in the district court challenging the State Department's "overcomplement" system. Pursuant to this personnel practice, the positions of certain employees were abolished. Although these employees were not terminated, they were not selected for promotions or other forms of advancement. *Crowley v. Schultz, supra*, 704 F.2d 1271. Moreover, notice was not given to employees placed an overcomplement status and they did not have the opportunity to challenge this status. *Id.*

In June 1977, the district court enjoined the overcomplement system. Subsequently, theh parties settled some damage claims and agreed to litigate the other claims before a Special Master. Plaintiffs also sought attorneys' fees under the Back Pay Act, as amended. An award of attorneys' fees was recommended by the Special Master and approved by the district court. The State Department appealed the award of fees, citing the Savings Clause.

The Reform Act provides for an award of attorneys' fees in two sections of Title 5 of the United States Code: section 7701, under which the MSPB, through administrative proceedings, may award fees; and section 5596, the Back Pay Act, under which an agency or a court may award fees. Thus, attorneys' fees available through administrative as well as judicial proceedings. To determine

whether the Savings Clause should apply to both types of proceedings, the United States Court of Appeals for the District of Columbia Circuit in *Crowley* examined the legislative history of the Reform Act. The court found "no suggestion that the judicial aspect of section 5596 be separated and treated specially. We find no reason to treat differently provisions which analytically fit together and which Congress considered together. The Savings Clause should apply to all of them." *Id.* at 1274.

As a result, the court invoked the Savings Clause and held that an award of attorneys' fees was barred under the Back Pay Act because the suit was commenced in March 1974, prior to the effective date of the Reform Act, which amended the Back Pay Act to provide for an award of attorneys' fees. *Id.* at 1275.

Plaintiff argues that the decision in *Crowley* does not prohibit an award of attorneys' fees in this case because suit was filed on April 4, 1979, at which time the Reform Act was in effect. Thus, plaintiff contends that the Savings Clause does not apply. Plaintiff's argument, however, ignores the administrative history of this case.

The Court notes that in the instant case, unlike the situation in *Crowley*, plaintiff was given oral and written notice of the action the Selective Service was taking on November 28, 1978. Thereafter, counsel for plaintiff contacted the Selective Service in an attempt to persuade the agency to cancel its demand that plaintiff undergo a psychiatric examination and to restore plaintiff to duty status. Only after these administrative appeals proved unsuccessful did counsel for plaintiff file suit on April 4, 1979. Therefore, the Court must consider not only the date the suit was filed but also the date that the personnel action was initiated and whether any administrative proceedings were pending at the time the Reform Act took effect.

Because the Reform Act was in effect when plaintiff's suit was filed in April 1979, the Savings Clause only

would be applicable if administrative proceedings involving this matter were pending on January 11, 1979, the date the Reform Act took effect. As a result, the Court must determine whether "administrative proceedings" were pending on January 11, 1979.

As indicated in Part I, *supra*, plaintiff was directed by letter of November 28, 1978, to take a psychiatric fitness-for-duty examination and was placed on sick leave pending the agency's receipt of the report on this examination. To determine whether this action constitutes an "administrative proceeding," the Court takes guidance from the regulations promulgated by the MSPB, implementating and construing the Savings Clause. The regulations state in pertinent part:

> (b) *Administrative proceedings and and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review on January 11, 1979, the date on which the Act became effective. *An agency proceeding is considered to exist once the employee has received notice of the proposed action.*

5 C.F.R. § 1201.191(b) (1983) (emphasis added).

This regulation was validated by the United States Court of Appeals for the District of Columbia Circuit in *Kyle v. ICC*, 609 F.2d 540 (D.C. Cir. 1979).[3] In *Kyle*, three federal employees petitioned separately for review of final orders of the MSPB upholding adverse personnel actions. The Reform Act provides for review of final

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[3] Although the Court recognizes that Kyle "does not address the peculiar statutory posture of the Back Pay Act" Crowley v. Schultz, *supra*, 704 F.2d at 1275, it does discuss the Savings Clause and its purpose.

orders or decisions of the MSPB in the Court of Claims or in a United States Court of Appeals. 5 U.S.C. § 7703(b)(1) (Supp. 1979). The Savings Clause also applies to this portion of the Reform Act.

The three federal employees seeking review in the court of appeals had received notice of the proposed personnel action before the Reform Act became effective. However, each case was decided adversely by the MSPB after the Act became effective on January 11, 1979. *Id.* at 542.

The court of appeals examined the regulations promulgated by the MSPB construing the Savings Clause and indicated that:

> Under the Merit System Protection Board's interpretation of the savings clause, each proceeding was pending when the Act became effective, and must therefore be reviewed judicially under prior law, which did not permit review in a Court of Appeals.

1979, at which time the Reform Act was in effect. The Board entered its decision on April 18, 1979. *Kyle v. ICC, supra,* 609 F.2d at 542 n.1. Despite the fact that the appeal was filed when the Reform Act already was in effect, the court found that the triggering date for purposes of application of the Savings Clause was November 28, 1978, the date on which the administrative action took place.

Applying the same rationale to the instant case, the Court finds that the triggering date in this case also is November 28, 1978, the date on which plaintiff was notified by the Selective Service that he was being placed on sick leave and was ordered to take a psychiatric fitness-for-duty examination. The fact that plaintiff filed suit in this Court on April 4, 1979, is not dispositive.

Therefore, the Court finds that an administrative proceeding was pending at the time the Reform Act became effective. Because the Savings Clause is applicable in this

situation, the Court finds that plaintiff is not entitled to an award of attorneys' fees under the Back Pay Act, as amended, 5 U.S.C. § 5596(b).

III.

In accordance with the above, the Court denies plaintiff's motion for attorneys' fees. An appropriate order is attached.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

Dated: October 25, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0971

ROBERT M. T. WILSON,
Plaintiff

v.

THOMAS TURNAGE, DIRECTOR,
SELECTIVE SERVICE SYSTEM,
Defendant

[Filed Oct, 26, 1983]

ORDER

Upon consideration of the report and recommendation of Magistrate Burnett on the issue of plaintiff's entitlement to an award of attorneys' fees, plaintiff's objections to the Magistrate's recommendation against an award of attorney's fees and memorandum of points and authorities in support thereof, defendant's response thereto, the entire record herein, and for the reasons stated in the accompanying memorandum opinion, it is by the Court this 25th day of October 1983,

ORDERED that plaintiff's motion for attorneys' fees be and hereby is denied.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
600 E Street, N. W.
Washington, D. C. 20435

November 28, 1978

Dear Mr. Wilson,

In accordance with 5 CFR 831.1203(a), the Selective Service System has determined that a fitness-for-duty examination of you is necessary. This determination is based upon a study of your recent communications addressed to the President. The examination shall include but will not be limited to the indications of mental or emotional illness.

The examination will be conducted by Dr. Robert Buckler in the Psychiatry Clinic at Walter Reed Hospital, third floor, Georgia Avenue entrance, reporting to Mrs. Robinson not later than 11:30 a.m., 6 December 1978, for a doctor's appointment at 12:00 noon.

The examination will be without cost to you. If you object to Dr. Buckler, you may participate in the selection of another examiner.

You will be in a sick leave status pending our receipt of the report of the examination.

Appropriate action will be taken on the basis of the examination, and you will be promptly advised thereof.

Sincerely,

/s/ R. F. Wisniewski
R. F. WISNIEWSKI
Administrative and Logistics Manager

Mr. Robert M. T. Wilson
National Headquarters
Selective Service System
Washington, D. C. 20435

STATUTORY PROVISIONS

5 U.S.C. § 5596. Back pay due to unjustified personnel action

* * * *

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title; and

* * * *

Savings Clause to the Civil Service Reform Act of 1978 Pub. L. 95-454, § 902, 92 Stat. 1224 (5 U.S.C. § 1101 note)

* * * *

"(b) No provision of this Act (see Tables volume) shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

"(c) No suit, action, or other proceeding lawfully commenced by or against the Director of the Office of Personnel Management or the members of the Merit Systems Protection Board, or officers or employees thereof, in their official capacity or in relation to the discharge of their official duties, as in effect immediately before the effective date of this Act [see note under this section], shall abate by reason of the enactment of this Act [see Tables volume]. Determinations with respect to any such suit, action, or other proceeding shall be made as if this Act had not been enacted."

Powers of President Unaffected Except by Express Provisions. Section 904 of Pub.L. 95-454 provided that: "Except as otherwise expressly provided in this Act [see Tables Volume], no provision of this Act shall be construed to—

> "(1) limit, curtail, abolish, or terminate any function of, or authority available to, the President which the President had immediately before the effective date of this Act [see note under this section]; or
>
> "(2) limit, curtail, or terminate the President's authority to delegate, redelegate, or terminate any delegation of functions."

Reorganization Plans No. 1 and 2 of 1978 Not Consistent With Civil Service Reform Act of 1978. Section 905 of Pub.L. 95-454 Provided that: "Any provision in

either Reorganization Plan Numbered 1 or 2 of 1978 [set out in the Appendix to this title], inconsistent with any provision in this Act [see Tables Volume] is hereby superseded."

Legislative History. For legislative history and purpose of Pub.L. 95-454, see 1978 U.S. Code Cong. and Adm. News, p. 2723.

Title 5, Code & Federal Regulations (1981 comp.)

Subpart F—Saving Provisions

§ 1201.191 Saving provisions.

* * * *

(b) *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

* * * *